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IN THE

Supreme Court of the United States

EVAN CAROLYN,

Petitioner,

v.

ORANGE PARK COMMUNITY ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the California Court of Appeal may unilaterally create an exemption from application of the definition of "Public Accommodation" in 42 U.S.C. § 12181(7) of the Americans With Disabilities Act ("ADA") which enables a private entity to close and remove disabled access which had been in existence for over 30 years to a recreational equestrian trail system which otherwise remains open to all members of the public, thereby effectively nullifying the ADA's equal access purpose?

2. May the California Court of Appeal unilaterally create an amendment to the definition of "Public Accommodation" in 42 U.S.C. of § 12181(7) of the Americans With Disabilities Act ("ADA") providing authority to a private entity to deny disabled access to its recreational trails facility which offers otherwise unfettered public access, based on a hypothetical analysis that the private entity could have excluded the public from access to its facilitiy although no such exclusion had ever occurred?

3. Did the published opinion of the California Court of Appeal conflict with this Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S. Ct. 1879 (2001), by restrictively construing the statutory definition of "Public Accommodation" of 42 U.S.C. § 12181(7), thereby limiting the scope of the ADA and the right of the federal government to require equal access to the disabled by affirming the trial court's refusal to consider the uncontroverted evidence demonstrating that the

recreational facility "affects commerce" in reaching the determination that a recreational trail system was not a Public Accommodation for purposes of the ADA?

4. Under the new rule announced by the California Court of Appeal, what is the appropriate standard for determining whether a facility is a "Public Accommodation" for purposes of the ADA where there are recreational facilities that are conceded to be open to the pubic without restriction?

a. Is "failing to actively deny the public access to the recreational property" by the private entity that owns or operates the recreational property sufficient grounds to prevent classification of a recreational property as a "Public Accommodation" under 42 U.S.C. § 12181(7) as held by the Court of Appeal?

b. Is "failing to actively deny the public access" a sufficiently concrete standard to avoid running afoul of the purpose of the ADA under § 12101 (b) (3) to ensure that the Federal Government plays a central role in enforcing the standards established . . . on behalf of individuals with disabilities?

c. Is a history of unfettered public access to a recreational facility that affects commerce sufficient or must the facility engage in a level of active solicitation of the public to be held a "Public Accomodation" under 42 U.S.C. § 12181(7)?

d. If active solicitation of the public is required to be a "Public Accommodation" under 42 U.S.C. § 12181(7), what is the required threshold degree of such conduct?

5. Does the failure to provide any objectively ascertainable application of its newly created exemption to the application of the definition of "Public Accommodation" in 42 U.S.C. § 12181(7) conflict with Congress' stated purpose of the ADA as set forth in 42 U.S.C. § 12101(b)(2) to create clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities?

6. Does the newly created exemption from application of the Public Accommodation definition of 42 U.S.C. § 12181(7) conflict with the purpose of the ADA set forth in 42 U.S.C. § 12101(b) (4) to invoke the sweep of congressional authority, including the commerce power, to enforce rights of the disabled pursuant to the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities?

PARTIES TO THE PROCEEDING

Petitioner is Evan Carolyn, an individual.

Respondent is Orange Park Community Association, a non-profit corporation, organized and existing under the laws of the State of California.

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OPINIONS BELOW

The opinion of the California Court of Appeal is reported as *Carolyn v. Orange Park Community Association*, 177 Cal.App.4th 1090, 99 Cal.Rptr.3d 699 (2009), 2009 Cal.App. LEXIS 1556, 14 Accom. Disabled Dec. (CCH) ¶ 14-019; rehearing denied 2009 Cal.App. LEXIS 1705 (Cal.App.4th Dist. October 19, 2009). The opinion is set forth at Appendix A.

Review was denied by the California State Supreme Court as *Carolyn (Evan) v. Orange Park Community Association* 2009 Cal LEXIS 13494 (Cal. Dec. 23, 2009) without published opinion. A copy of the order denying review is at Appendix F.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on October 23, 2008.

The opinion of the California Court of Appeal was filed on September 21, 2009 with the decision approved for publication.

Rehearing was denied by the California Court of Appeal on October 19, 2009. A petition for review by the California State Supreme Court was denied on December 23, 2009.

Article III, Section 2 of the Constitution of the United States confers jurisdiction upon this Court.

This Court also has jurisdiction over this case under 28 U.S.C. § 1257 because the decision of the California Court of Appeal involves denial of the rights of Petitioner Evan Carolyn under a United States statute, specifically Title III of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* The highest court of the State of California, the California State Supreme Court, denied discretionary review of the decision of the California Court of Appeal. Denial of discretionary review by the highest court of a state is deemed to render the decision with respect to which review is denied to be the decision of the court of last resort of a state. *See Supreme Court Rule 13.1.*

Supreme Court Rule 10(c) provides that where a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, the Court will consider review on *certiorari*. The decisions below concerning *Carolyn v. Orange Park Community Association, supra*, directly conflict with Supreme Court decisional authority, including but not limited to *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001); as well as with the definition of Public Accommodation enacted by Congress in the Americans With Disabilities Act at 42 U.S.C. § 12181(7).

This Court has jurisdiction to clarify standards in interpretation of federal statutes, including disapproval of lower court interpretations. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604,608, 113 S.Ct. 1701, 1705 (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

* * * *

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub. L. 101-336, Sec. 2, July 26, 1990, 104 Stat. 328.)

The definition of "Public Accommodation" under Americans With Disabilities Act, is found in 42 United States Code § 12181(7) (See Appendix H).

42 United States Code § 12181(7). provides, in relevant part, as follows:

> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce —
>
> * * *
>
> (I) A park, zoo, amusement park, **or other place of recreation**;
>
> * * *
>
> (L) A gymnasium, health spa, bowling alley, golf course, **or other place of exercise or recreation**. [emphasis added]

14th Amendment to United States Constitution. See Appendix H.

U.S. Constitution, Article I, Section 8; Article VI. See Appendix H

STATEMENT OF THE CASE

This case involves the creation by the California Court of Appeal of a new and pervasive exemption from the Americans with Disabilities Act 42 U.S.C. § 12101 *et seq.* (hereinafter sometimes referred to as "ADA") which overrides the statutory definition of Public Accommodation under 42 U.S.C. § 12181 (7) to exempt virtually any private entity from ADA compliance simply by an assertion that the entity had the right to exclude the public from its facility and had just not actively availed itself of that right. Therefore, utilizing this judicially crafted exemption, a private entity owning a facility which otherwise falls within the definition of a "Public Accommodation" pursuant to 42 U.S.C. § 12181 (7) may prohibit or remove disabled access after many years of such access being available while maintaining unfettered public access to the same facility for those who are not disabled.

The newly created exemption relies solely on the hypothetical possibility of exclusion of the public and an amorphous suggestion that the ADA shall have no application simply because a private entity has not sought to actively exclude the public.

Pursuant to the California Court of Appeal opinion, evidence of public use of a recreational facility and the

consequent effects upon commerce becomes irrelevant and no evidence that the operations of such entities affect commerce need even be considered.

The California Court of Appeal decision creates widespread implications by its imposition of novel limits on the application of the ADA. The published opinion provides judicial validation for any private entity to assert that its facility which fits the statutory definition of Public Accommodation is not subject to ADA compliance requirements.

The California Court of Appeal decision provides neither standards nor guidance for determination when a privately owned recreational facility that has offered unfettered public access will be subject to ADA compliance as a Public Accommodation. The opinion provides that private property does not fall within the ambit of the definition of Public Accommodation even if it is clearly within the parameters of one of the twelve described categories listed in 42 U.S.C. § 12181(7) regardless that public access is openly permitted and without regard to whether or not the facility affects commerce if it possible to assert that such access could have been excluded and that access was permitted as a result of the lack of active exclusion of the public.

Further, in direct contravention of both 42 U.S.C. § 12181(7) and this Court's holding in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001), the California Court of Appeal's holding provides that a trial court need not even consider the public nature of the operations of the facility or whether it affects commerce. The California Court of Appeal decision removes factual

consideration of the federal statutory definition as well as the commerce clause criterion from the determination. Thus, the decision effectively guts the application of the ADA to any private entity.

The exemption from application of the ADA definition of Public Accommodation created by the California Court of Appeal has no limitations or standards. It alters the issue of applicability of ADA compliance to facilities of the type set forth in 42 U.S.C. § 12181(7), as broadly construed, from actual public use and effect on commerce to a subjective measure of the potential state of mind of the private entity ownership. It is not even clear that the private entity must have ever considered exclusion of the public, the test as stated in the California Court of Appeal Opinion demands only that there exist the hypothetical possibility of exclusion.

The California Court of Appeal decision creates an exemption which relies not on the nature of the facility and its operation, as provided by the ADA definition, but rather on speculation of what a private entity might have or could have done. In the absence of any standard or limitation, the decision presents not merely a judicial limitation on the application of the ADA, but rather, in the unrestrained discretion of the owner or operator of a Public Accommodation, a complete bar replacing the right to equal access with the right to arbitrary discrimination.

The danger in such an approach is that it does not merely open the door to ADA avoidance, it provides a blanket exemption under which the majority of private

entities can maintain public access without ADA compliance. It returns California and any jurisdiction that might look to this opinion for guidance back to the pre-ADA era for the disabled and shreds the protection and purpose upon which the ADA was founded.

The stated purpose of the ADA is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)

The California Court of Appeal decision undermines the mandate for the elimination of discrimination against the disabled by enabling avoidance of the key fundamental statutory definition of "Public Accommodation" which determines what facilities are subject to the ADA. This new rule does so by creating an exemption from the application of the federal statutory definition for the private entity which could have but has not actively excluded the public.

Even if this truncation of the ADA definition were permissible, there is no standard provided as mandated by paragraph 2 of the stated purpose for the application of this exemption from the definition of Public Accommodation.

The Petitioner here had demonstrated unfettered public access to the OPCA Trail System for a period of thirty years. The Court of Appeal opinion confirmed the trial court directive that it is not necessary to even reach the issue of whether operation of the trail system affected commerce, thereby denying the scope of protection afforded by the federal statute, the ADA, and the 14th Amendment.

This Court has provided clear and unmistakable guidance to lower courts concerning the application of the ADA. *In PGA Tour, Inc. v. Martin, supra*, this Court squarely addressed the proper interpretation and construction of the term Public Accommodation as defined by the ADA.

> The phrase 'public accommodation' is defined in terms of 12 extensive categories

> [footnote omitted] which the legislative history indicates **'should be construed liberally'** to afford people with disabilities 'equal access' to the wide variety of establishments available to the not disabled [footnote omitted] (532 U.S. at 676-677, emphasis added.).

The creation of an exemption which provides a clear and easy opt-out from application of the ADA by limiting the applicability of the federal statutory definition of "Public Accommodation" directly conflicts with the holding in *PGA Tour, Inc. supra.* The California Court of Appeal has not only rejected a liberal interpretation of Public Accommodation, it has so restricted the application of the term as to assure that private entities will be able to avoid application of the ADA at will.

The Court should grant *certiorari* to review the California Court of Appeal decision. Failure to do so will leave the largest state in population in the U.S. with no protection under the ADA for the disabled in reference to private entities whose facilities are otherwise within the definition of Public Accommodation. Further, even if justification for the California Court of Appeal decision were assumed, *arguendo*, the lack of standards alone demands that this Court provide the guidance guaranteed under ADA's mandate for "**clear, strong, consistent, enforceable standards**" for its application.

FACTUAL AND PROCEDURAL HISTORY

Orange Park Community Association ("OPCA") owns and operates an equestrian trail system (the "OPCA Trail System") which had been open to the public with access for the disabled for approximately thirty years. The OPCA Trail System interconnects with other trail systems similarly open to the disabled and all members of the public forming a network of equestrian trails in Southern California. Historically the OPCA Trail System was open for use by the disabled using horse drawn carts and carriages as well as by riders who could ride astride.

In July of 2007, OPCA erected physical barriers to its trails system which blocked access by the disabled using horse drawn carts or carriages. The Petitioner, Evan Carolyn is a disabled American veteran who sought to use the OPCA Trail system but was prohibited from doing so by the newly erected barriers placed at the trail heads by OPCA. Mr. Carolyn requested removal of the barriers in writing. OPCA refused to respond and ignored his written request. Thereafter, Petitioner filed an action under the ADA, the Unruh Act, and the California Disabled Persons Act against OPCA.

In the course of discovery, OPCA officers and directors testified in depositions that: (1) the OPCA trail system is a place of recreation; (2) the OPCA Trail System was open to the public; (3) that OPCA is a private entity and (4) that the OPCA Trail system was used by hay delivery trucks and farriers among others.

Cross Motions for summary judgement were filed based upon the facts presented in the deposition testimony along with uncontroverted evidence presented by declaration that the OPCA trail system affected commerce. The trial court denied the Petitioner's motion and granted that of the Defendant on the ground that OPCA Trail System was not a Public Accommodation. The trial court declined to provide any factual foundation for its holding and ignored the OPCA admissions that the trail was a place of recreation which was open to the public.

A. *Application of 42 U.S.C. § 12181(7) Definition of Public Accommodation Raised to the Trial Court in Papers Filed Prior to the Summary Judgment Hearing and In Oral Argument*

Petitioner raised the proper construction of the ADA concerning the definition of Public Accommodation to the trial court on multiple occasions. First, it was raised in the Petitioner's Opposition to the Defendant's Motion for Summary Judgment, filed on August 22, 2008. Petitioner again offered authority and discussion concerning the ADA and its Public Accommodation definition to the trial court in Plaintiff's Reply to Defendant OPCA's Opposition to Plaintiff's Motion for Summary Judgment or in the Alternative for Summary Adjudication of Issues filed on August 29, 2008.

The Court's tentative ruling was posted online on September 4, 2008.

On September 5, 2008, Petitioner appeared before Trial court Judge Steven Perk and through his counsel argued orally, in part, as follows:

> **MR. HUSBAND:** Your Honor, plaintiff is puzzled by the tentative concerning Public Accommodation. That is the key to the case. 42 USC 12181 — and this is in my papers, your Honor, but if I may briefly read the definition so we know what we are talking about, I think it will facilitate the argument. Do I have leave of Court?
>
> **THE COURT:** Sure
>
> **Mr. HUSBAND:** Thank you, your Honor.
>
> Public accommodation. And I'm reading from 42 USC, section 12181, subsection 7. Public accommodations. 'The following private entities are considered public accommodations for purpose of this subchapter if the operation of such entities affect commerce:' And then there's a list of a number of categories. The relevant categories here, your Honor, are category I, which includes a park, zoo, amusement park, or other *place of recreation.* Also subsection L, which says gymnasium, health spa, bowling alley, golf course, or *other place of exercise or recreation.*
>
> Plaintiff believes that defendant's trail system meets this definition. In the papers before the Court, the defendant has admitted that it is a

private entity. The equestrian trail system, plaintiff submits, is an *other place of recreation* as suggested in either subsection I or subsection L. [emphasis added]

* * * *

As a place of recreation, the plaintiff believes that it fits within the list specified in 42 USC 12181, subsection 7.

Also, your Honor, the case was cited in the moving papers, but plaintiff would urge the Court to consider, again, the Supreme Court's opinion in *PGA Tour v. Martin*, 532 U.S. 661. The liberal construction of the term *public accommodation* is specifically endorsed by the Supreme Court as follows — I'm reading from footnote 23 of the *Par* — or, excuse me, *PGA Tour v. Martin*.

"The phrase 'public accommodation' is defined in terms of 12 extensive categories which the legislative history indicates 'should be construed liberally' to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled."

That's precisely this case, you Honor. As a matter of fact, in *PGA v. Martin*, what the Supreme Court held was that a public accommodation was not even limited to a place. In *PGA v. Martin*, the Supreme Court

> held that a tour, the golf tour, was a place of public accommodation for purposes of the Americans with Disabilities Act.
>
> * * * *
>
> The defendant has admitted – and this is in the papers in the separate statements, your Honor – that it operates a trail system. Another element of the definition is satisfied.
>
> The only one left is that it affects commerce. And in the affecting commerce area, this should be considered in two respects: One is factually, the other is legally.
>
> In the legal respect, your Honor – this is the *Wickard v. Filburn* case. This is a case – I'll cite other authority – in which Congress has chosen to extend its authority as far as it can, which is pretty far.
>
> * * * *

The trial judge declined to change his tentative ruling. Summary judgment was granted on the ground that Defendant's equestrian trail system was not a Public Accommodation.

B. *Statutory Definition of "Public Accommodation" and Applicable Supreme Court Authority Brought to the Attention of the California Court of Appeal in Two Briefs*

Petitioner appealed to the California Court of Appeal. The issue concerning proper construction and application of the definition of Public Accommodation in the ADA was made in Appellant's Brief at pages 2-3; 5; and particularly in pages 15-24; also at pages 26-28; and 29-36. Discussion of the relevant authorities concerning the issue of federal statutory application raised by this Petition for Writ of Certiorari were also raised in Appellant's Reply Brief to the Court of Appeal in pages 7-10, 15-18 and 20. In particular in Appellant's Opening Brief, Petitioner raised the federal statutory construction issue as follows:

> "2. *The U.S. Supreme Court held that Construction of "Public Accommodation" for ADA Purposes is to Be Liberal*

The Supreme Court in *PGA Tour, Inc. v. Martin* squarely addressed the proper interpretation and construction of the phrase here in issue as follows:

> The phrase 'public accommodation" is defined in terms of 12 extensive categories [footnote omitted] which the legislative history indicates '***should be construed liberally***' to afford people with disabilities 'equal access' to the wide variety of establishments available to non-disabled [fn. omitted]

(532 U.S. at 767-677, emphasis added.)

The Supreme Court, in *PGA Tour, Inc. v. Martin*, was construing the ADA, the same federal law here in issue. The Supreme Court held that under the liberal construction intended by Congress, the Professional Golfing Association Tour was a public accommodation for purposes of the Americans With Disabilities Act, even though the PGA Tour, Inc. itself did not even own real property. The Supreme Court found that it was apparent, based on both the general rule and the comprehensive definition of "public accommodation," that the PGA's golf tours were within the coverage of Title III, and therefore the PGA must not discriminate against any disabled individual in the full and equal enjoyment of the facilities, services, privileges, and accommodations of the PGA Tour.

The key words of 42 U.S.C. § 12181(7) are "affects commerce." In *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902, the Supreme Court noted that when the words "affecting commerce" are used without qualification, that Congress' intent to invoke its full authority under the Commerce Clause is manifest. (529 U.S. at 854.) And the words "affects commerce" are used without qualification in 42 U.S.C. § 12181(7).

3. *OPCA Officials Admitted That The OPCA Trail System Is Open To The Public*

According to the record of this case, three representatives of the OPCA admitted that its trail system is open to the public. (AA:436, 434-435 [deposition testimony of OPCA Director Albert Harrison Pritts ("AH Pritts

Depo."); AA:445 [deposition testimony of OPCA Arena & Trails Chairperson Joanne Pritts ("Joanne Pritts Depo")]; AA:496-497 [deposition testimony of OPCA Director Rex Vance ("Vance Depo")].)

4. *OPCA Officials Admitted that the OPCA Trail System is a Place of Recreation*

Three OPCA officials also admitted that the OPCA trails are part of an integrated trail system connected to trails and trail systems of other communities. (AA:446 [Joanne Pritts Depo.]; AA:452; [deposition testimony of OPCA President James Waite Dickinson ("Dick Depo"]; AA:496-497 [Vance Depo]).

Thus, it is undisputed that the OPCA trail system is a place of recreation open to the public and integrated with other trail systems. These admissions may suffice in and of themselves to qualify the OPCA trail system as a public accommodation under 42 U.S.C. § 12181(7) when the mandated liberal construction is applied. At the very least, this evidence demonstrates a controverted issue of material fact that precludes summary judgment. But there was more evidence before the trial court concerning the public accommodation status of the OPCA trail system.

5. *Admissions by OPCA that Establish that the OPCA Trail System Affects Commerce*

The following additional admissions of OPCA create issues of fact that OPCA's operation of its trail system affects commerce. These admissions include:

- OPCA trails are used for delivery of hay, feed, and shavings, by use of trucks. See Joanne Pritts depo AA:443, 447; Dick Depo AA: 452-453;

- OPCA contracts with a California corporation to maintain a section of the OPCA trail system on a regular basis (Vance Depo AA:489-490);

- OPCA's board is aware that horse owners in the OPCA area use farriers and equine veterinarians (Vance Depo AA:493-494);

- Most people in OPCA have hay delivered from a local feed store by a 2 ½ ton flatbed truck, using the OPCA trail system (Vance Depo AA:494-495; Dick Depo AA:452-453); and

- The OPCA Director Rex Lee Vance admitted that if a number of horses in the OPCA area was reduced by half, there would be a significant economic impact to the suppliers of goods and services to horsemen in that area (AA:496)."

The California Court of Appeal's opinion not only failed to properly apply the ADA, but in addition, created a new and unjustified overriding limitation, the "no active exclusion rule" on the definition of Public Accommodation in the federal civil rights statute, the ADA. Further, the Court of Appeals decision affirmed the trial court's determination that it was unnecessary to reach the issue of whether the OPCA Trail System "affected commerce" under the statutory definition of 42 U.S.C. § 12181. Refusal to consider the commerce issue was a reaffirmation that the facts of actual public use would no longer be considered in the context of the ADA. While the trial court erred by failing to properly apply the statutory definition, the Court of Appeals magnified and compounded the problem by announcing the new test for avoiding classification as a Public Accommodation and publishing its opinion.

The California Court of Appeals decision was issued and approved for publication on September 21, 2009. Petitioner filed a Petition for Rehearing with the Court of Appeal on October 5, 2009.

C. *Petition for Rehearing by the Court of Appeal Raised the Issue that the Court of Appeal Opinion Created a New Rule Which Contradicted Controlling Federal Statute and Conflicted with U.S. Supreme Court Precedent*

The Petition for Rehearing raised the error which this petition seeks to correct in pages 2-11. Petitioner's outline of argument included the headings:

> "The Opn. proposes a new rule which contradicts controlling statutes."

* * * *

> "The statutory definition of Public Accommodation found in 42 U.S.C. 12181(7) which was not applied in the Opn. to determine whether the OPCA Trail System is a Public Accommodation within the meaning of the ADA, the Unruh Act, and the California Disabled Persons Act would have lead to a different result."

The Petition for Rehearing to the California Court of Appeal specifically stated:

> "The opinion is not based on relevant statute or precedent, but rather enunciates a new rule, unsupported by controlling statutory law or case law, and inconsistent with relevant law. . . . The Opn. fails to apply the ADA definition which is also applicable to the Unruh Act and the California Disabled Persons Act and an error of law is constituted by such failure. . . . The Opn. made an error of law in failing to address whether the OPCA Trail System 'affected commerce', an essential element of 42 U.S.C. 12181 and therefore an improper analysis of whether the OPCA Trail System was a Public Accommodation under relevant law was made."

The Petition for Rehearing quoted a relevant part of the Court of Appeal Opinion as follows:

> We hold only that a private property owner (here a homeowners association) does not convert a private recreational property into a public accommodation by failing to actively deny the public access to the recreational property.' (Opn. at 18-19)

and replied:

> "Again, this approach is an error of law. The statutory standards set forth in the ADA, the Unruh Act and the California Disabled Persons Act are bypassed and ignored by such a ruling. See 42 U.S.C. § 12181(7); *PGA v. Martin, supra.*
>
> "The conclusion that the OPCA Trail System was not a place of public accommodation was based on a failure to apply the proper statutory standards for determining whether the trail system was a public accommodation.
>
> "The Opn. referred to OPCA's CC&R's but it cannot be seriously maintained that CC&R's can override federal civil rights legislation."

The Petition for Rehearing filed by Petitioner was denied on October 19, 2009.

D. *Petition to California State Supreme Court for Review Raised Issues Concerning Proper Interpretation of "Public Accommodation" Under 42 U.S.C. § 12181(7) and Problems Created by the Court of Appeal's "No Active Exclusion" Test*

Petitioner filed a Petition for Review with the California State Supreme Court. In the Petition for Review, the error of federal law, which was significantly exacerbated by the Court of Appeal opinion, was raised to the California State Supreme Court in pages 5-7, 8, 10, 11-14 and 15-16 of the Petition for Review to the State Supreme Court.

In particular, Petitioner argued:

> ". . . rather than come to the logical and legally compelled conclusion that OPCA's equestrian trails are a Public Accommodation because they are indisputably places of recreation that are open to the public without restriction, the *Carolyn* Court held that they are not a Public Accommodation because 'OPCA *could* bar the general public, including Carolyn, from accessing the trails if it wished to do so,' although there is 'no indication OPCA has ever attempted in the past or intends in the future' to do so." (Opn., pp. 10 italics added, 16-17 ['we think it clear OPCA's trails would not be a Public Accommodation if OPCA actively excluded the general public from using the trails,' and '[w]e do not think OPCA's private trails transform into Public Accommodations merely because OPCA does

not actively exclude members of the public from using the trails'].)

"The Court stated its holding as: '[A] private property owner (here, a homeowners association) does not convert to private recreational property into a Public Accommodation by failing to actively deny the public access to the recreational property.' (Opn., pp. 18-19.)

"In support of its novel 'no active exclusion' theory, the *Carolyn* court cited *Liebler v. Point Loma Tennis Club*, (1995) 40 Cal.App.4th 1600, 1611-1612 (Opn., p. 10), Civil Code § 1009 (*ibid)* and *Coronado, supra*, 163 Cal.App.4th at pp. 836, 845-851 (Opn., p. 17). None is applicable. . . ."

In permitting the erroneous holding to stand the law in California now provides an exemption from the ADA for any private entity that admits the public and could have, but did not ever seek to actively exclude the public. Further, in light of the references to *Lieber and Coronado*, the law in California is not only may a private entity that permits public access avoid any obligation to comply with the ADA, it may also choose to invite the public into its facility and deny access only to disabled individuals to portions of its facilities despite the fact that the entire facility remains open to the public. Under this "no active exclusion" exemption, ADA compliance would not be required to those portions of any privately owned and publically accessible facility if the private entity simply chooses to assert that they

could, if they so desired, deny access to those parts of the Public Accommodation. In essence this is a return to the "you can come in the door, but you can't use the restrooms" philosophy and the pre ADA harsh realities of outright discrimination.

REASONS FOR GRANTING THE PETITION

A. *Articles Posted on the Internet, Seminars, Symposia and Print Media Have Disseminated the New Court of Appeal Exemption From the Definition of "Public Accommodation" and Based Thereon Multitudes of Denials of Disabled Access are Likely to Result.*

In late 2009 as well as in early 2010, homeowners association groups and attorneys who serve them have widely touted the new judicially created exemption from application of the ADA. Simply entering the name of the case below into an internet search engine will reveal over a dozen references, including homeowners association group newsletters, and several law firms, including more than one firm which have prepared seminar handouts, in one instance with three seminars scheduled in separate cities in California during January and February 2010, which describe the new rule and how facilities can be exempt from ADA compliance.

The Metropolitan News-Enterprise, a legal newspaper in Southern California, published an article on Wednesday, September 23, 2009 which described the Court of Appeal decision. The combination of the notoriety which is rapidly being acquired by the new rule, with the fact that private property owners such as

homeowners associations, marinas and many other privately owned facilities which have been open to the public, and which affect commerce, as the Orange Park Community Association trail system does, would be delighted to be free of any obligation to comply with the ADA, results in a likelihood that the decision below will not be merely an isolated case.

Unless this Court grants certiorari, the new exemption from applicability of the ADA, created by the Court of Appeal will remain the law in California. It can be expected to lead to hundreds of instances of barriers being erected to bar the disabled from facilities which would qualify as a Public Accommodations to which the disabled had previously had access, in the same fashion as was done by the Orange Park Community Association. In the past, California law has lead other jurisdictions to adopt new rules. Private entities can save money by avoiding ADA compliance. Each private entity excluding the disabled under the banner of the new "No Active Exclusion" exemption, would thereby be freed of any costs or obligations to comply with the ADA.

B. *The Carolyn v. Orange Park Community Association Opinion Conflicts With this Court's Holding in PGA Tour v. Martin.*

The new rule announced by the California Court of Appeal in *Carolyn, supra*, is 180 degrees from the direction for construction of the statutorily defined "Public Accommodation" mandated by this Court in *PGA Tour, Inc. v. Martin, supra*. The liberal construction of the definition of Public Accommodation under the ADA decreed by *PGA Tour, Inc. v. Martin, supra*, would be

replaced by the new "No Active Exclusion Rule" which liberally *denies* applicability. This holding, if permitted to stand, would enable thousands of Public Accommodations to escape compliance with the ADA.

In fact the *Carolyn* holding in conjunction with that of *Coronado v Cobblestone,* 163 Cal.App.4th 831, 77 Cal.Rptr.3d 883 (2008) (rev'd in part by *Munson v. Del Taco* (2009) 46 Cal.4th 661, 94 Cal.Rptr.3d 685, 208 P.3d 623) effectively nullifies the ADA for application in California. *Coronado* held that a Public Accommodation can have both public and private access areas and compliance with the ADA is limited to those areas which have public access. Under the newly devised Carolyn "no active exclusion" rule, actual public access becomes irrelevant for purposes of determining ADA compliance.

As the new California Court of Appeal *Carolyn* rule requires only a " could have" or " might have" assertion it transforms this unrealized potential to a license to exclude the disabled from restrooms at a stadium, the docks at a marina or any other specific portion of a facility. The California Court of Appeal ruling becomes authority upon which a private entity owning or operating a Public Accommodation can deny the disabled, or worse, can remove access previously established.

OPCA openly admitted the public to its trails for over 30 years and that public included the disabled. In April of 2007, OPCA abruptly closed access to the disabled, leaving the same trails open to the remainder of the public. This new "No Active Exclusion Rule" creates precisely the form of discrimination the ADA

was enacted to prohibit. OPCA has asserted that the ADA does not apply to its recreational facility which is open to the public. The California Court of Appeal has not merely acquiesced in this discrimination, it has facilitated the evisceration of the definition of Public Accommodation and severely constricted the application of the ADA. The OPCA is a private entity operating a recreational facility open to the public which was given the absolute right to deny access to the disabled under the newly created exemption crafted by the California Court of Appeal.

The decision to deny Evan Carolyn disabled access to the recreational trails was made summarily by the trial court despite uncontroverted evidence before it of the effect on commerce of the OPCA Trail System and numerous admissions by OPCA Board Members that the OPCA trail system was a place of recreation which was open to the public. Only the disabled were barred from access by OPCA's decision to erect barriers and only the disabled remain barred from this access.

The California Court of Appeal decision in *Carolyn, supra,* stands as a concrete obstacle to the disabled as surely as the barrier to the disabled erected by the OPCA in 2007. The new rule crafted by the Court of Appeal violates the mandate and purpose of the ADA. It enables circumvention to the definition of Public Accommodation in the ADA, and it directly contradicts this Court's directive and holding in *PGA Tour, Inc. v. Martin, supra.* It is respectfully requested that this Court grant certiorari to maintain the integrity of the ADA.

C. *The Carolyn v. Orange Park Community Association Opinion Would Operate to Deny Federal Civil Rights Under the ADA Which Were Granted By Congress*

The published opinion of the California Court of Appeal in *Carolyn v. Orange Park Community Association* would deny rights of disabled people by creating an unjustified loophole for most recreational private property owners which was certainly not intended by Congress.

The congressional definition of Public Accommodation found in 42 U.S.C. § 12181(7) is avoided by the Court of Appeal opinion in *Carolyn, supra.* Almost all privately owned facilities which are open to the public can be said to be open to the public because the owner does not actively prevent the public from having access. 42 U.S.C. § 12181(7) provides that facilities similar to those listed that affect commerce are subject to the ADA. This Court has held that using the term "affecting commerce" without qualification reflects Congressional intent to exercise its authority to the maximum extent. *See Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 146 L.Ed.2d 902 (2000); *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82 (1942).

The California Court of Appeal now holds that if the access by the public to these facilities is due to lack of active exclusion on the part of the owner, then there is no need to determine whether or not there is any effect on commerce of such facilities — as the federal legislation provides — but rather as a result of this new rule, if the private owner failed to actively deny access

to the public, *ipso facto*, the facility is not a Public Accommodation under the ADA and therefore not subject to the ADA regardless of whether the facility affects commerce under the test set forth by this Court in *Gonzalez v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (2005), and otherwise qualifies as a Public Accommodation under 42 U.S.C. § 12181(7).

D. *The Impact of the California Court of Appeal Decision is to Create an Amendment to the ADA Exempting From Compliance Virtually All Private Entities and Validating The Denial of Access for the Disabled*

Based on the published opinion the Court of Appeal, any park, any trail, any marina, any facility which clearly meets the federal statutory definition of a Public Accommodation under the ADA, can evade the application of the ADA on a mere assertion that the owner has not actively excluded members of the public — which would include virtually all such facilities.

This novel holding of the California Court of Appeal eviscerates the ADA. It provides published judicial authority to avoid the ADA to hundreds of facilities in California that are Public Accommodations under 42 U.S.C. § 12181(7) and thousands of such facilities across the nation. Further, the application of this new exemption permits not only non-compliance for new facilities, but removal of disabled access by existing recreational facilities and all Public Accommodations from the entire facility or from whatever parts of those facilities the ownership determines were not actively promoted for public use.

The published opinion of the California Court of Appeals in *Carolyn v. Orange Park Community Association* defies the clear mandate of the statutory purpose of the ADA for equal access and for **"clear, strong, consistent, enforceable standards"** (42 U.S.C. § 12101 (b)(3) and this Court's precedent in *PGA Tour v. Martin, supra.* Upon publication, the Court of Appeal decision became a "Get out of Compliance with the ADA Free Card." The opinion, which the California State Supreme Court strengthened by denying review provides spurious authority which can be used to avoid application of the federal civil rights laws found in the ADA, contrary to the clear directive of this Court in *PGA Tour v. Martin, supra* and the stated purpose of the ADA.

CONCLUSION

The definition of "Public Accommodation" in 42 U.S.C. § 12181(7) is the primary determinant of the applicability of the ADA. The Court of Appeal opinion severely truncates this definition, in contravention of the express terms of the statute, and in defiance of this Court's directive in *PGA Tours, Inc. v. Martin, supra.* Attorneys, homeowners association groups and the media are spreading the news of this new exemption from the requirements of the ADA. Unless this Court grants *certiorari*, the law has been changed, contrary to statute and precedent, and the new test will be used to the detriment of hundreds of thousands of disabled people. Simply put, any private entity may exclude the disabled while continuing to welcome the public.

Petitioner urges the petition for a writ of *certiorari* be granted.

Respectfully submitted,

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